

¹ Although the transcript is labeled preliminary hearing, this was the post-award hearing.

ISSUES

This is an appeal from a post-award proceeding for additional medical treatment. The underlying award of compensation was for an injury to the right knee in 1999. In this proceeding claimant seeks medical treatment for her right ankle. Respondent denied that claimant's current ankle complaints were caused by the 1999 accidental injury. The claimant argued that she had complained about her ankle to the treating doctors and that her ankle pain progressively worsened with the passage of time. The Administrative Law Judge (ALJ) found claimant met her burden of proof to establish that her ankle condition is related to her underlying accidental injury and awarded medical treatment for claimant's right ankle.

Respondent requests review of whether claimant's ankle complaints are related to her worker's compensation injuries that occurred on or about September 29, 1999, and October 4, 1999, to the right knee. Respondent argues that claimant's ankle problems are not a direct and probable consequence of the original work-related injury and therefore the referral to an ankle specialist should be denied.

Claimant argues the ALJ's Post Award Medical decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

A brief history of the injury and treatment claimant received is helpful to the resolution of this dispute. Claimant suffered accidental injuries to her right knee on both September 29, 1999, and October 4, 1999. She was provided conservative treatment but ultimately, on January 5, 2001, Dr. Pollock performed an arthroscopic debridement of the medial femoral condyle on claimant's right knee. Claimant continued to complain of knee pain. On July 19, 2001, Dr. Pollock released claimant at maximum medical improvement. Dr. Pollock provided claimant an impairment rating of 5 percent to the right lower extremity. The doctor further noted that claimant would eventually need a knee replacement but not for quite some time.

As part of the litigation of the underlying award claimant's medical expert, Dr. Pedro Murati, provided claimant with a 31 percent rating to her right lower extremity. The ALJ then sent claimant to Dr. Philip R. Mills for an independent medical examination. Dr. Mills performed the examination on September 4, 2002, and provided claimant an 8 percent rating to the right lower extremity. This impairment was for the knee and no impairment for the ankle was included.

When claimant was examined by Dr. Mills she complained of right ankle pain. It should be noted that claimant had suffered a separate work-related injury to her back on March 4, 2002. The history of ankle complaint provided to Dr. Mills was that claimant started noticing her ankle pain after injuring her back.

The litigation proceeded to an award for claimant's right knee injury. The ALJ, in an Award dated September 12, 2003, determined claimant suffered a 19.5 percent scheduled disability to her right lower extremity. The Workers Compensation Board (Board) on March 9, 2004, modified the Award to an 8 percent scheduled disability to the right lower extremity.

Sometime in 2004, the claimant permanently relocated to her home in Arkansas. On May 3, 2004, claimant filed an application for post-award medical requesting "provision of an authorized treating doctor." The post-award medical hearing was held on August 31, 2004, and the ALJ issued an Order dated September 2, 2004, which required respondent to provide a list of three physicians, located near claimant's residence in Arkansas, so that claimant could choose an authorized treating physician for continued medical treatment. Respondent filed an application for review before the Board on September 16, 2004. The matter was placed on summary docket calendar. On January 31, 2005, the Board affirmed the ALJ's decision.

On April 13, 2005, the ALJ issued an Order finding that respondent failed to provide a list of physicians in a timely manner and therefore claimant was able to choose Dr. Luke Knox as her authorized treating physician. But Dr. Christopher Arnold became claimant's authorized treating physician in Arkansas.²

On October 20, 2005, Dr. Arnold first saw claimant. At that time claimant noted that she had not had any orthopedic treatment in the past two or three years. Her complaints were limited to her right knee and Dr. Arnold initially provided her conservative treatment for those complaints.

It appears claimant called Dr. Arnold's office on September 25, 2007, requesting a referral to a physician to treat her hip and ankle. Consequently, Dr. Arnold's office notes from an October 11, 2007 office visit contain the first reference to claimant's right ankle complaints. The claimant wanted to discuss her right ankle and expressed the opinion that her right ankle pain was due to overcompensation for her knee. The doctor's note regarding that visit indicated right ankle pain secondary to probable recurrent sprains.

² At the post-award hearing on the instant claim, the parties simply stated that Dr. Arnold has been claimant's authorized treating physician since 2005.

Dr. Arnold continued to treat claimant for her right knee complaints and also provided conservative treatment for claimant's right ankle. An MRI of the right knee revealed a possible lateral meniscus tear and on February 22, 2008, Dr. Arnold performed a right knee medial and lateral meniscectomy.

On April 22, 2008, another application for post-award medical was filed and claimant requested a \$3,495 recumbent bike per Dr. Arnold's recommendation. An Agreed Order of the parties was signed by the ALJ on March 16, 2009, in which respondent agreed to pay claimant \$1,000 towards the purchase of a recumbent bicycle per the recommendation of the authorized treating physician, Dr. Arnold.

Dr. Arnold also had MRI studies performed on claimant's right ankle in 2008 which did not reveal any fracture or avascular necrosis. The doctor concluded claimant had pain symptoms related to arthritis and possibly bursitis. Dr. Arnold treated claimant with Celebrex and physical therapy. Finally, Dr. Arnold concluded claimant probably had post-traumatic arthritis as well as a possible loose body in her right ankle. Because Dr. Arnold specializes in treating knees he referred claimant to Dr. Terry Sites for possible arthroscopic surgery on her ankle.

The respondent denied claimant's request to proceed with treatment for her ankle. Consequently, claimant filed the instant post-award medical application on April 1, 2009, requesting authorization of the surgery/treatment recommended by Dr. Sites.

At the post-award medical hearing held on April 30, 2009, claimant requested medical treatment with Dr. Sites upon a referral from the authorized physician Dr. Arnold. Claimant testified that during the course of her treatment, she mentioned her ankle problems to Dr. Pollock but never received any treatment for that condition. After she relocated to Arkansas and came under the care of Dr. Arnold she received treatment for her knee and two years later reported her ankle pain to Dr. Arnold. Claimant further testified that her ankle has gotten progressively worse over time. And she testified she has not suffered any accidents, slips or falls since her 1999 accidental knee injury.

In an April 28, 2009 letter to claimant's counsel, Dr. Arnold had expressed the opinion that it was his assumption that claimant's ankle condition was related to her work injury but further noted that the doctor would visit more with claimant to find out all the exact details about the injury.³ When questioned at his deposition, Dr. Arnold testified that claimant's ankle injury was a combination of a direct injury suffered in 1999 and the result of overuse compensating for the knee injury. Dr. Arnold testified:

³ Arnold Depo., Cl. Ex. 1.

Q. Okay, What I would like to do while we have you on the record and here's an opportunity for the judge to - - to read this and understand this issue. Just so you understand, the insurance company is not wanting to provide treatment on the ankle under their argument that there is insufficient evidence to causally relate this to her claim. What I would like, if you could, is articulate onto the record for the Judge your theory as to the causal relationship of - - of this ankle, whether it's directly related to the original date of accident or if this is a secondary effect, such as overuse or something like that from having the knee injury over time. Can you explain that to the judge, which - - which of those theories you're espousing?

A. Yeah. I think it's probably a combination of both. I think it's from the compensation. We know that when you have a - - a bad - - when you have a knee injury like Ms. Harvey's, this resulted in two subsequent arthroscopies. It throws off your gait, which can - - and we see, commonly, people that have problems with their joints above and below the involved joint. So I think that's one component of it.

Also, you know, again, I can't say as I wasn't there - - there the year 2009 [sic]. She's never been able to give me a clear mechanism for the injury to the ankle, though she has given one for the knee. So I think it - - and I feel like the combination of both of those is enough for me to say the majority of her ankle symptoms are related to the - - to the accident. But, again this is ten years after the accident.⁴

On cross-examination Dr. Arnold agreed that there could have been some other causation for claimant's ankle condition and that a reasonable person could conclude that it is not particularly clear what caused claimant's ankle problems. Dr. Arnold further agreed that, as noted in Dr. Mills' report, it was quite possible that claimant's ankle injury could have been caused by her back accident.

On re-direct, Dr. Arnold then seemingly qualified his opinion to state that an altered gait alone would not have caused the ankle problems but instead it was caused by the initial injury and an altered gait. Dr. Arnold testified:

Q. - - meaning she was still having problems with the right knee. She was still having treatment with the right knee. And is it a fair statement that off and on, through that course, she would limp?

A. Yes.

Q. And does that limping, over time, that autogenic gait, result in - - let me rephrase it that way - - these progressive problems in the other joints of the right leg - -

⁴ Arnold Depo. at 15-17.

A. Can - -

Q. - - and the ankle?

A. They can.

Q. Within a reasonable degree of medical probability, is that what you think is happening here?

A. I can't say, not just because - -

Q. Oh - -

A. I can't say that - -

Q. - - under my direct examination questions, I asked you, within a reasonable degree of medical probability, is the right ankle related secondary to the knee injury?

A. I - -

Q. And you said yes.

A. I would say that it - - it can be related to - - what I said in that, what I was referring to, that it could be a combination of her autogenic gait and also from her initial injury, which she described.

Q. Okay. Now, you just used the work "could" that time. The standard that we're working with is probable.

A. Right.

Q. But you don't - -

A. You're talking about - - when you were just - -

Q. Now, with all this - -

A. - - the gaits - -

Q. - - information you have, is you believe it to be probable?

A. Are you - -

MR. PAZELL: Asked and answered. Objection.

A. Are you referring to the gaits or the injury or both? I was referring to both.

Q. Well - - and that's - - that's my question then. I mean is - -

A. Okay. The second time, you asked just about the gait.

Q. Okay. And this time, I'm asking is it related to her knee, either by original accident or as a secondary effect or both?

A. Well - -

Q. Is it related to the knee within a reasonable degree of medical probability?

A. Of both? Yes.⁵

Dr. Alice Martinson, board certified in orthopedic surgery, examined and evaluated the claimant on February 24, 2009 at the request of respondent's insurance carrier. The doctor took claimant's medical history and then performed a physical examination. The claimant did not know how long her ankle complaints had been present but thought they had been present for more than five years nor did she recall a specific injury. The physical examination included claimant's right hip, knee and ankle. The range of motion in claimant's right hip, knee and ankle were normal. X-rays revealed some narrowing of joint space in the right knee. Dr. Martinson diagnosed claimant as having post-traumatic arthritis in her right knee, trochanteric bursitis in the right hip and anterior talofibular impingement syndrome in the right ankle.

Dr. Martinson explained that the talofibular ligament is most commonly injured in an ankle sprain. And when the ankle is sprained and the ligament torn, it heals without a problem. But at times the ligament can roll up and as the ankle rocks back and forth the bundle of scar tissue is compressed causing pain. And Dr. Martinson concluded the condition develops after an acute injury and does not worsen over time but instead stays the same. Dr. Martinson testified:

Q. Okay. What was the diagnosis specifically again on the right ankle?

A. My specific diagnosis was probable anterior talofibular impingement and that is a condition which develops after an acute injury, that is not something which would be one of the sort of chronic wear and tear kinds of syndrome that you could postulate.

Q. Would that condition get worse over time if untreated?

⁵Arnold Depo. at 37-39.

A. No, actually it tends to stay the same.

Q. And so the condition that you diagnosed you would attribute to an acute event?

A. An acute event at some point, yes.⁶

Dr. Martinson further opined that claimant's right hip and ankle complaints were not related to her original October 1999 injury. Dr. Martinson examined the medical records of claimant's treatment and concluded that because ankle complaints were not made until years after the original injury, claimant's ankle complaints were not the consequence of the 1999 injury. The doctor also concluded the ankle complaints were not caused by an antalgic gait. Dr. Martinson testified:

Q. A couple of follow-up questions. Dr. Arnold testified earlier as to his belief regarding the causation of Ms. Harvey's ankle injury and he believed that the knee injury threw off Ms. Harvey's gait and that as a result she has an altered gait problem and he said that in combination with overuse. Could you comment on your opinion regarding Ms. Harvey's altered gait?

A. Ms. Harvey had no altered gait when I saw her. She most likely has had episodic alterations of her gait over time. Certainly you would when you were - - had just had an arthroscopy of the knee, but the normality of her gait when I saw her was evidence that her knee was not a major ongoing problem as far as that, as far as walking and limping were concerned and so I do not think she had the kind of severity and intensity of gait abnormality that would make someone - - either an ankle or a hip problem a plausible secondary consequence.⁷

Workers who are injured in accidents arising out of and in the course of their employment are entitled to receive benefits under the Kansas Workers Compensation Act, including such medical treatment that may be reasonably necessary to cure and relieve the workers from the effects of their injuries. K.S.A. 44-510h(a) provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation . . . **as may be reasonably necessary to cure and relieve the employee from the effects of the injury.** (Emphasis Added)

⁶ Martinson Depo. at 36-37.

⁷ *Id.* at 27-28.

And the injured workers' rights to receive medical benefits continue after an award for compensation has been entered. The post-award medical statute, K.S.A. 44-510k(a), provides, in pertinent part:

At any time after the entry of an award for compensation, the employee may make application for a hearing . . . for the furnishing of medical treatment. . . . **The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.** (Emphasis Added)

The claimant suffered an injury to her right knee in 1999. She received treatment for that condition and as the underlying claim was litigated she appears to have first made some general ankle complaints in 2002. But when examined by Dr. Mills in September 2002 she noted the onset of right ankle pain after a back injury for which she had filed a separate workers compensation claim. It is also significant to note that Dr. Murati, her medical expert in the underlying award, provided a report in 2001 that contained no mention of ankle pain and testified that claimant only had right knee complaints when he examined her. And after she received an award for her right knee there appears to have been a few years when she received no medical treatment. But when she again began to receive medical treatment with Dr. Arnold in 2005, it was for her knee and there were approximately two years during that treatment that claimant made no ankle complaints.

Claimant's testimony was somewhat problematic in that she denied any injury to her ankle between 1999 and 2005 but related her ankle injury to a back injury in 2002 when she saw Dr. Mills. And she stated that her ankle problem was progressive but Dr. Martinson noted her condition was one that would not worsen over time.

Based upon the absence of contemporaneous right ankle complaints for extended periods of time, especially during claimant's treatment with Dr. Arnold, the Board concludes that Dr. Martinson's testimony is more persuasive and finds claimant failed to meet her burden of proof that her current right ankle condition is related to the underlying accidental injury to her right knee. Consequently, the ALJ's Post Award Medical is reversed and claimant is denied additional treatment for her right ankle.

AWARD

WHEREFORE, it is the decision of the Board that the Post Award Medical Award of Administrative Law Judge Nelsonna Potts Barnes dated January 22, 2010, is reversed and claimant's request for treatment for her right ankle is denied.

IT IS SO ORDERED.

Dated this 30th day of April 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
John A. Pazell, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge